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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

SEARS, ROEBUCK AND CO.,
SEARS MERCHANDISE GROUP,

Petitioners,

v.

THOMAS LONG,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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	:	
v.	:	
	:	
SEARS ROEBUCK & COMPANY and SEARS MERCHANDISE GROUP	:	NO. 95-0141
	:	

ENTERED: 3/1/96
CLERK OF COURT

MEMORANDUM

Giles, J. February 27, 1996

Thomas Long brings this action against his former employer Sears Roebuck & Company and Sears Merchandise Group ("Sears") alleging that Sears terminated his sales position as part of a nation-wide reduction in force designed to eliminate older workers from its ranks and to avoid the accrual and payment of pension rights. Defendants move for summary judgment pursuant to Federal Rule of Civil Procedure 56(c) asserting that Long received and retained over $39,000 in severance pay in exchange for his execution of a valid release and waiver of all claims associated with his termination, including suits for age discrimination. Defendants further assert that the reduction in force that caused Long's termination was the result of a business decision to eliminate, except for the heating and air conditioning department ("HVAC"), the entire HIPS division. Long cross-moves for partial summary judgment urging the court to declare as a matter of law that the release is invalid for failure to comply with § 626 of the Older Workers Benefit Protection Act ("OWBPA"). For the following reasons, Sears' motion is granted and Long's motion is denied.

I. LEGAL STANDARD[1]

Summary judgment shall be granted where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). This court is required, in resolving a motion for summary judgment, to determine whether "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To make this determination, the district court shall believe the evidence of the non-moving party and draw all reasonable inferences in the non-movant's favor. *See id.* at 255. The court may not make credibility determinations or weigh the evidence. *Id.* at 252. While the movant bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact, *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986), the non-moving party "after adequate time for discovery" must then make a showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* If the record thus construed could not lead the trier of fact to find for the non-moving party, there is no genuine issue for trial and summary judgment shall be granted. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

II. FACTUAL BACKGROUND

Thomas Long was born on July 17, 1936 and is now fifty-nine years old. He is a high school graduate who has supplemented his education by attending several college and busi-

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1. The Pennsylvania Human Rights Act ("PHRA") utilizes the same analytical framework applied to ADEA claims. Thus, the federal and state claims shall be addressed together. *See Chmill v. City of Pittsburgh*, 412 A.2d 860, 871 (Pa. 1980) (stating that the PHRA should be construed in light of principles of fair employment law which have emerged from federal anti-discrimination statutes).

ness courses independently and through his employers. Long began working for Sears in 1964. He held sales positions in various departments and served in a management capacity until the early 1980's when he was assigned to sell home improvement products in the HIPS division. As a HIPS employee, Long at different times, sold heating and air conditioning, roofing, siding, windows and doors. His primary responsibility was to sell roofing. (Plaintiff's Response to Defendants' Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment at 2-3).

At the relevant time, HIPS was comprised of two sections. The SFI section subcontracted all of its work to independent contractors who sold, furnished and installed Sears products under a licensing agreement to use Sears name. Through the FI section, Sears employees sold home improvement products that were installed by outside contractors. Long was employed in the FI section of HIPS. In 1992, Sears undertook an economic analysis of HIPS' performance and concluded that although the division was profitable over all, the SFI department was so profitable that its revenue masked the FI division's poor performance. As a result of that review several recommendations were made to Sears and in January 1993, Sears announced a nation-wide shut-down of its HIPS services. Except for the HVAC unit which would be transferred to another Sears division, Sears represented to the HIPS employees that it was discontinuing its home improvement services permanently. (Pl.'s Response and Mot. for Summ. J. at 8).

In February 1993, Sears presented Long and other similarly situated employees with a reorganization package that provided severance benefits to workers displaced by the reduction in force in exchange for a "General Release and Waiver" ("the Release") . The Release stated across the top in capital letters: "DO NOT SIGN THIS UNTIL YOU HAVE READ THE ATTACHED NOTICE." The text of the Release provided,

GENERAL RELEASE AND WAIVER I

In consideration of the benefits I will receive under the Sears Closed Unit/Reorganization Severance Allowance Plan as described in the attached Benefit Notification form, I, THOMAS LONG, hereby release, waive, and forever discharge officers, successors, and assigns from any and all actions, causes of action (INCLUDING, BUT NOT LIMITED TO, ACTIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, THE AGE DISCRIMINATION IN EMPLOYMENT ACT, STATE CIVIL RIGHTS STATUTES, AND THE AMERICANS WITH DISABILITIES ACT), damages or claims of damage of every character whatsoever by reason of my employment with Sears, whether known or hereafter discovered, including, but not limited to, my termination from Sears.

I have read this General Release and Waiver and understand all of its terms. I have signed it voluntarily with full knowledge of its legal significance. I have been given the opportunity to consult with an attorney but have chosen not to do so.

Date: 3/18/93 /s/ Thomas G. Long

/s/ Russell Lindsay

01/93

(Exhibits to Memorandum in Support of Defendants' Motion for Summary Judgment, Ex. F).

The Notice referred to in the Release states across the top in capital letters: "IMPORTANT NOTICE: THIS NOTICE IS BEING PROVIDED TO SATISFY THE REQUIREMENTS OF THE OLDER WORKERS BENEFIT PROTECTION ACT." (Exs. to Mem. in Support of Defs.' Mot. Summ. J., Ex. G). It provided, in relevant part, that Long had up to forty-five (45) days from the date the package was received to decide whether to sign the General Release and Waiver. (*Id.*) The Release was revocable up to seven (7) days after its execution and no severance allowance payments would be made or commenced until the revocation

period had elapsed. (*Id.*) The Notice also stated that a list was attached of the birthdates and job titles of incumbents who had been offered the package. If applicable, a list of employees not offered the package was also attached. That list, if provided, did not include the names of employees deemed ineligible to receive the package (i.e., part-time and part-time regular employees). (*Id.*) The Notice stated that the package had been offered to "UNIT CLOSING – ALL TIMECARD REGULAR AND CHECKLIST ASSOCIATES EMPLOYED IN THE UNIT."[2] (*Id.*) The Notice also suggested that the signatory consult an attorney prior to executing the Release and stated that signing the Release did not waive any rights which might arise in the future. (*Id.*) To the extent prior representations made conflicted with the terms of the Release, the Release governed. (*Id.*)

Sears paid Long more than $39,000 under the severance plan.[3] His last day of work was April 9, 1993.[4]

On March 8, 1994, notwithstanding the signed Release and full payment of the severance package, Long filed cross-charges of discrimination with the Equal Employment Opportunity Commission and the Pennsylvania Human Relations Commission alleging violations of the Age Discrimination in Employment Act of 1967 ("ADEA") , 29 U.S.C. §§ 621-634, and the Pennsylvania Human Relations Act of 1955 ("PHRA") , 43 Pa. Cons. Stat. Ann. §§ 951-963. (Exs. to Mem. in Support of Defs.' Mot. Summ. J., Ex. I). In that charge Long averred that he had been discriminated against based on his age because after he had been laid off he learned that Sears had "retained younger employees with less seniority" to

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2. Long was a checklist employee.

3. There is no dispute that Long would not have otherwise been entitled to receive these monies from Sears. Unlike the general pension plan, the severance package provided for twenty-six (26) weeks of pay plus other benefits. (Pl.'s Response and Mot. Summ. J. at 7) (Sears allegedly concealed that less generous severance pay was available that was not conditioned upon executing a release).

4. Because Sears placed Long on a one year leave of absence his actual termination date from Sears was April 8, 1994. (Pl.'s Response and Mot. Summ. J. at 45).

work in other departments and that contrary to its representation Sears "continued its Home Improvement Operations." (*Id.*)

Thereafter, Long filed a federal complaint reasserting his claim of age discrimination under the ADEA and PHRA. Additionally, he avers that Sears violated § 510 of the Employee Retirement Security Act of 1974, as amended, ("ERISA"), 29 U.S.C. § 1140, by dismissing him to avoid further accrual and payment of his pension benefits. He also asserts several common law claims. Long argues that his substantive claims are properly before this court because the signed Release is not a valid or enforceable waiver of his rights and cannot operate to bar this action. According to Long, the Release is void *ab initio* because it did not conform to OWBPA standards and therefore was not "knowingly and voluntarily" made. (P1.'s Response and Mot. Summ. J. at 42).

Defendants move for summary judgment asserting that all of Long's claims are barred by the Release. (Defendants' Motion for Summary Judgment at 7). Sears denies that the release fails to meet the facial requirements of the OWBPA and that Long signed the release under duress and without fully understanding its contents. (Defs.' Mot. Summ. J. at 7-8). Sears argues that even if this court were to determine that the Release did not comply with the OWBPA, Long's failure to revoke the Release and return, or offer to return, the money paid is a ratification that renders the Release enforceable. (Defs.' Mot. Summ. J. at 9-11). Sears further argues that Long cannot establish that it has continued in the home improvement business or that younger less experienced and less successful employees were retained and given other jobs with Sears rather than terminated as part of the reduction in force. (Defs.' Mot. Summ. J. at 12-14). Finally, Sears avers that Long has failed to show that his loss of pension benefits is anything more than a consequence of his termination and not motivated by a specific intent by Sears to interfere with his pension rights. (Defs.' Mot. Summ. J. at 14-15).

This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

III. DISCUSSION

Before this court can address whether material issues of fact exist to preclude summary judgment as to Long's substantive claims of discrimination, we must determine whether the Release signed by Long in exchange for more than $39,000 in severance benefits is an enforceable agreement that precludes litigation of his claims.

In 1990, Congress enacted the OWBPA in response to a dispute among the circuits as to the proper analysis to be applied to determine when a waiver of rights under the ADEA had been entered knowingly and voluntarily.[5] Section 626(f) of the OWBPA established a standard list of criteria which any written waiver must include, at a minimum, to be considered adequate. *See* 29 U.S.C. § 626 (f) (1) (A) - (H).[6]

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5. Prior to the OWBPA's enactment, the second, third, fifth, tenth and eleventh circuits utilized a "totality of the circumstances" test to evaluate the validity of a waiver under the ADEA. The fourth, sixth and eighth circuits applied general contract principles.

6. The ADEA as amended by the OWBPA provides in relevant part,

> (1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum –
>
> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> (B) the waiver specifically refers to rights or claims arising under this chapter;
>
> (C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
>
> (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
>
> (E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
>
> (F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or
>
> (ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within

The party asserting the validity of the waiver has the burden of proving that it was knowingly and voluntarily made. 29 U.S.C. § 626(f) (3).

Long asserts that paragraph (H) of subsection (f)(1) obligated Sears to provide birthdate and job status information to him regarding similarly situated employees who were offered and not offered the severance package so that he could determine whether age bias existed. However, the information provided in the Sears Notice and Release, he contends, is too strictly circumscribed for any real comparison to have been made. Sears disclosed information pertaining to employees in Long's immediate unit only who were offered the severance package. He asserts that the statute required Sears to reveal information for affected employees nationwide or at least within the Pennsylvania area to meet OWBPA standards. (Pl.'s Response and Mot Summ. J. at 50-54). He further asserts that the Release is defective because it is not written "in a manner calculated to be understood" by the average participating individual, (*id.* at 46); it is broadly written and purportedly encompasses claims that arose after execution of the

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NOTES *(Continued)*

which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such an agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to-

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

29 U.S.C. § 626(f) (West Supp. 1995).

Release, (*id.* at 44); Sears officials represented that the money paid was to assist terminated employees with the transition and not as consideration for a relinquishment of rights, (*id.* at 49); and the 45 day review period was illusory because a Release not signed within five days would result in a period in which no benefits were paid, (*id.*, at 55 n-25). Long further asserts that he was pressured into signing the agreement by his supervisor Russell Lindsay who called him frequently and told him that co-workers' severance packages were being withheld because Long had not yet signed the Release. (*Id.* at 54-55).

Sears contends that its Release meets the facial requirements of the OWBPA and it points to a paragraph-by-paragraph comparison between its Notice and the statutory list of required information to support that assertion. Specifically, Sears avers that in compliance with paragraph (H) it disclosed information regarding all eligible employees who were offered or not offered the severance package. Long's assertion that he should have been given information on employees deemed ineligible and employed at other locations is beyond the scope of the statute. Furthermore, the notice stated that Long had 45 days to consider the Release, Sears merely told its employees that an interruption in pay may result from a later executed Release. Sears also denies that Long signed his Release under duress or without understanding its contents.

Whether the Sears Release meets the facial requirements of the OWBPA is a question of fact not resolvable here by summary judgment. Several of the issues raised by Long turn upon a jury's evaluation of the documentary evidence and witness credibility. Thus, we cannot determine as a matter of law that Long's waiver under the Sears Release was knowing and voluntary.

Assuming, for purposes of this motion that the Release failed to meet OWBPA standards, the critical question is two-fold: is a Release that fails to comport with OWBPA void *ab initio* as asserted by Long or voidable as contended by Sears; and was Long required to return the severance benefits received as a prerequisite to bringing suit under the ADEA

for claims waived by the Release and is his retention of the monies paid a ratification of an otherwise unenforceable agreement.

In the wake of the OWBPA's enactment a new split among the circuits has surfaced with regard to waivers that allegedly do not conform to OWBPA standards. Long urges the court to adopt the reasoning of the seventh circuit as pronounced in *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 2104 (1994), which reads the preamble to § 626 literally. It states, "an individual *may not waive* any right ... under this chapter *unless* the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1) (emphasis added). Long argues that a waiver that does not comport with OWBPA strictures is not knowing and voluntary and therefore is not an enforceable waiver. *See Oberg*, 11 F.3d at 682, 683 (severance agreement was unenforceable against plaintiffs because it failed to provide for forty-five day review period or to provide comparative information required under paragraph (H)). *Oberg* also purportedly stands for the proposition that ADEA claimants challenging the validity of a waiver are not required to return paid benefits as a prerequisite to filing suit and retention of that money is not a ratification of the alleged defective waiver that transforms it into an enforceable agreement. *Oberg*, 11 F.3d at 683, 684.

In *Oberg*, the seventh circuit opined that Congress intended to occupy this area of law with the OWBPA's enactment, *see id.* at 683, rendering inapplicable the pre-OWBPA practice of applying common law contract principles, such as ratification, to determine the enforceability of a waiver of ADEA rights. *Id.* Relying on the eleventh circuit's decision in *Forbus v. Sears, Roebuck & Co.*, 958 F.2d 1036 (11th Cir.), *cert. denied*, 506 U.S. (1992), and an Illinois district court opinion in *Isaacs v. Caterpillar, Inc.* 765 F. Supp. 1359 (C.D.Ill. 1991), the *Oberg* court concluded that the plain language of the OWBPA precluded ratification of a contract that was invalid when executed. The court further concluded that the reasoning applied in *Forbus* and *Isaacs* compelled it to conclude that benefits paid need not be returned as a prerequisite to maintaining an ADEA suit. *Oberg*, 11 F.3d at 684. Those cases fol-

lowed the Supreme Court decision in *Hogue v. Southern R. Co.*, 390 U.S. 516 (1968) which interpreted the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60, to state that the issue of tendering back of consideration as a prerequisite to bringing suit under FELA was a matter for federal rather than state law. *Oberg,* 11 F.3d at 684 (citing *Hogue,* 390 U.S. at 517). Because common law notions of fairness were inapplicable in construing the FELA statute, a claimant could retain any consideration received and those monies would operate as a set-off against an award. *Id.* (citing *Hogue,* 390 U.S. at 517-18).

Sears asserts that *Oberg* is wrongly decided and this matter is controlled by *Wamsley v. Champlin Refining and Chemical, Inc.*, 11 F.3d 534 (5th Cir. 1993), *cert. denied,* 115 S.Ct. 1403 (1995), and its progeny, as adopted by the fifth and fourth circuits. Because we are persuaded that *Wamsley* is the correct analysis to be employed in determining the enforceability of an alleged waiver of rights under the ADEA, we will discuss that case at length.

In *Wamsley,* five former employees of Champlin Refining & Chemicals, Incorporated ("Champlin") brought suit under the ADEA alleging that Champlin had discriminated against them based on age by terminating their employment during a corporate acquisition that caused Champlin at the end of 1990 to close its Irving, Texas office. Each employee had been offered and accepted a Termination Pay Plan in exchange for the execution of a release of claims. The Champlin release provided a broad waiver of any claim or action against it and its successors "relating to or arising out of" employment with Champlin "or the termination of such employment, including . . . age discrimination" under the ADEA. *Wamsley,* 11 F.3d at 536-37. A notice accompanying the release stated that a terminated employee had up to 45 days to consider it, that it was revokable for 7 days after its execution and no payments would be made until the revocation period had expired. To avoid an interruption in pay and to receive termination pay not later than five days after the date of termination, a release had to be executed at least seven days prior to that payment date. *Id.* at 536-37. Under the Plan each plaintiff received a

cash incentive ranging from more than $25,600 to more than $90,000, plus other benefits including outplacement services through 1991, and medical, dental and life insurance benefits for a period of six months. *Wamsley,* 11 F.3d at 537 n.4.

The *Wamsley* plaintiffs filed suit and neither returned nor offered to return the severance benefits received alleging that their releases were "'void or voidable' due to duress and Champlin's failure to comply with one of the conditions of the OWBPA." *Id.* at 537. They asserted that Champlin failed to give them 45 days to consider the release as required by § 626(f)(1) of the OWBPA and therefore the waiver had not been "knowingly and voluntarily" made as required by the ADEA. *Id.* The district court granted summary judgment in Champlin's favor finding that the release was valid and that even if it were not valid when executed, plaintiffs had ratified the agreement by retaining the severance benefits after learning of its invalidity. *Id.*

On appeal, the appellants argued that the district court erred in granting summary judgment for the defendants asserting that material issues of fact existed as to the validity of the release and that the doctrine of ratification was inapplicable. Accepting appellants' first proposition, the fifth circuit affirmed finding that the validity of the release was immaterial because appellants had ratified the release as a matter of law. *Wamsley,* 11 F.3d at 538.

The court held that noncompliance with § 626(f) rendered the waiver "voidable" rather than "void" bestowing upon the promisor the power to disaffirm or avoid its duty to perform. *Id.* Relying on § 85 of the Restatement (Second) of Contract, it noted that a waiver was simply a contract and traditionally contracts entered under duress, fraud, mistake, or infancy were voidable. *Wamsley,* 11 F.3d at 538. The legislative history for the OWBPA supported that inference because it showed that Congress was concerned that an older worker not be subject to duress, fraud, coercion, or mistake of material fact when asked to sign an ADEA waiver. *See id.* at 539 n.8 (citing S.Rep.No. 101-263, 101st Cong., 2nd Sess. (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1537). Additionally, the court found that the escape clause of § 626(f)(1)(G) would have been

superfluous if noncompliance rendered the agreement void *ab initio. Wamsley,* 11 F.3d at 539. A voidable contract also fulfilled the stated purpose of the ADEA: "to help employers and workers find ways of meeting problems arising from the impact of age on employment." *Id.* (citing 29 U.S.C. § 621(b)). If OWBPA deficient waivers were considered void and incapable of ratification there would be little impetus for an employer to assume the risk associated with resolving these claims. *Id.* Consequently, the language and purpose of the OWBPA did not displace the court's earlier conclusion in *Grillet v. Sears, Roebuck & Co.,* 927 F.2d 217 (5th Cir. 1991), that an otherwise unenforceable agreement may be ratified by the retention of benefits paid. *See also Wittorf v. Shell Oil Company,* 37 F.3d 1151, 1154 (5th Cir. 1994) (retention of benefits in exchange for waiver operated to ratify waiver even if parties continued to negotiate beyond revocation period); *Blakeney v. Lomas Information Systems,* 65 F.3d 482 (5th Cir. 1995) (retaining consideration after discovery that waiver was voidable for failure to meet OWBPA standards ratified release), *petition for cert. filed,* 64 U.S.L.W. 3486 (U.S. Jan. 2, 1996) (No.95-1062); *Blistein v. St. John's College,* 1996 WL 30672 (4th Cir. Jan. 26, 1996) (affirming lower court decision, but overruling district court adoption of *Oberg* as proper rule for analysis of ADEA waiver and adopting *Wamsley* as consistent with jurisdiction's pre-OWBPA decision in *O'Shea v. Commercial Credit Corp.,* 930 F.2d 358, 362 (4th Cir.), *cert. denied,* 502 U.S. 859 (1991) recognizing ratification theory).

We believe that *Wamsley* is consistent with this jurisdiction's pre-OWBPA jurisprudence and would be followed if presented to the third circuit. In *Ponzoni v. Craft General Foods,* 774 F. Supp. 299 (D.N.J. 1991), *aff'd,* 968 F-2d 14 (3d Cir. 1992), the third circuit affirmed without opinion, a district court determination that the totality of the circumstances showed that plaintiff had executed a valid and enforceable release and subsequently ratified the release by retaining more than $135,000 in severance benefits to which he would not have otherwise been entitled. *Id.*

In that case, the district court employed a two-step analysis. First, it addressed the validity of the waiver by applying a

seven-factor test to determine whether Ponzoni had executed the waiver knowingly and voluntarily. The pre-OWBPA factors included the clarity and specificity of the release language; the plaintiff's education and business experience; the amount of time given plaintiff to consider the release prior to signing it; whether plaintiff knew or should have known his rights upon execution of the release; whether plaintiff was encouraged to or in fact received benefit of counsel; whether there was an opportunity to negotiate the terms of the waiver; and whether the consideration offered and accepted in exchange for the release exceeded the benefits to which an employee was already entitled. *Ponzoni*, 774 F. Supp. at 309 (citing *Cirillo v. Arco Chemical Company, a Div. of Atlantic Richfield Co.*, 862 F.2d 448, 451 (3d Cir. 1988)). Second, the court determined whether the release, even if defective, had been ratified by a retention of the consideration paid. *Id.* at 316-17.

We conclude that enactment of the OWBPA did not disrupt this two-step analysis. The OWBPA merely codified the "totality of the circumstances" test applied in step one of *Ponzoni*. Therefore, the principle of ratification survives enactment of the OWBPA as pronounced in *Grillet* and *O'Shea*, adopted and affirmed in *Ponzoni*, and now applied in *Wamsley* and its progeny.

Because Long retained, and did not offer to return, more than $39,000 paid in consideration of a Release that he suspected was defective, we hold that he ratified that Release and is precluded from pressing claims arising from his termination by Sears.

An appropriate order follows.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THOMAS LONG	:	CIVIL ACTION
	:	
v.	:	
	:	
SEARS ROEBUCK & COMPANY and SEARS MERCHANDISE GROUP	: :	NO. 94-0141

ORDER

AND NOW this 27th day of February 1996, upon consideration of Defendants' Motion for Summary Judgment and Plaintiff's Motion for Partial Summary Judgment and the parties responses thereto, it is hereby ORDERED that the Defendants' motion is GRANTED and the Plaintiff's motion is DENIED. Summary Judgment is ENTERED in FAVOR of the Defendants and AGAINST the Plaintiff.

BY THE COURT:

James T. Giles
J.